Creeping Legalism in Grievance Arbitration: Fact or Fiction?

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I. ABSTRACT

The problem of "creeping legalism," or incremental formalism, in grievance arbitration cases has been a continuing refrain in legal literature; however, until now empirical research concerning this problem has been scant. This study provides the most comprehensive and thorough analysis to date and supports the conclusion that legalization has continued to creep upward from the early 1970s to the late 1990s. More specifically, this study shows that there has been a statistically significant upward trend, with two exceptions, for various factors including, elapsed time, charged days, and post-hearing briefs. The two exceptions are the use of transcripts, which remained constant until considerable up-and-down variation began in 1990, and elapsed time during the hearing/post-hearing phase, which maintained a constant trend line for the entire twenty six year period. These results demonstrate the need for more concerted efforts on the part of the parties, arbitrators, and supporting organizations to rein in this trend, whether it is creeping or galloping, to reach a balanced level of legalism to commensurate with the maturation of the Braden model in the mid 1980s.

II. INTRODUCTION

After its impetus with the War Labor Board in the 1940s, grievance arbitration matured and became institutionalized by the 1960s along the lines of the model created by J. Noble Braden—a model based on Braden's view of arbitration as a quasi-judicial or private-judge mechanism—rather than the George Taylor model—a model based on the idea of arbitration as an extension of collective bargaining.[1]

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[1] Dennis R. Nolan & Roger I. Abrams, *Trends in Private Sector Grievance Arbitration, in* LABOR ARBITRATION UNDER FIRE 42, 44–47 (James L. Stern & Joyce M. Najita eds., 1997) [hereinafter *Trends*]. *See generally* Richard Mittenthal, *Whither Arbitration?, in* ARBITRATION 1991 THE CHANGES IN THEORY AND PRACTICE 35 (Gladys

The original and continuing purpose of grievance arbitration has been to provide an expedited and economical alternative to court proceedings. As Alleyne observed: "Grievance hearings . . . [should] be swiftly reached and swiftly conducted; nonlawyer representation for both sides . . . [should] be the rule rather than the exception."[2] Yet, starting in the late 1950s, various arbitrators observed, and warned against, creeping legalism.[3] Several sources continued the refrain during and after the maturation of the Braden model with the primary themes being increasing delays, formalism, and costs.[4] In fact, the problem of creeping legalism has not been a problem specific to the

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W. Gruenberg ed., 1991), *reprinted in* ARB. J., Dec. 1991, at 24. (discussing the changes in the field of arbitration with regard to the use of the Braden and Taylor models.)

[2] Reginald Alleyne, *Delawyerizing Labor Arbitration*, 50 OHIO ST. L.J. 93, 94 (1989).

[3] *E.g.*, Emanuel Stein, *Arbitration and Industrial Jurisprudence*, 81 MONTHLY LAB. REV. 866 (1958); Editorial, *Creeping Legalism in Labor Arbitration*, 13 ARB. J. 129 (1958); Benjamin Aaron, *Labor Arbitration and Its Critics*, 10 LAB. L.J. 605, 605–07 (1959).

[4] *E.g.*, Donald B. Straus, *Labor Arbitration and Its Critics*, 20 ARB. J. 197, 209 (1965); Harold W. Davey, *What's Right and What's Wrong with Grievance Arbitration*, 28 ARB. J. 209, 212 (1973); Harry E. Graham et al., *Grievance Arbitration: Labor Officials' Attitudes*, 33 ARB. J., June 1978, at 21, 24; Robert Coulson, *Satisfying the Demands of the Employee*, 31 LAB. L.J. 495, 496 (1980); Thomas A. Kochan, *Empirical Research on Labor Law: Lessons from Dispute Resolution in the Public Sector*, 1981 U. ILL. L. REV. 161, 179 (1981); Peter Seitz, *Delay: The Asp in the Bosom of Arbitration*, 36 ARB. J., Sept. 1981, at 29; Winn Newman & Carole W. Wilson, *Arbitration—As the Parties See It: A Union Point of View*, *in* ARBITRATION—PROMISE AND PERFORMANCE, PROCEEDINGS OF THE THIRTY-SIXTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 37, 43–44 (James L. Stern & Barbara D. Dennis eds., 1984); Robben E. Fleming, *Reflections on Labor Arbitration*, *in* ARBITRATION 1984: ABSENTEEISM, RECENT LAW, PANELS, AND PUBLISHED DECISIONS, PROCEEDINGS OF THE THIRTY-SEVENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 11, 19 (Walter Gershenfeld ed., 1985); Alleyne, *supra* note 2, at 94–106; David Alexander & Marcus Widenor, *Labor Perspective*, *in* ARBITRATION 1992: IMPROVING ARBITRAL AND ADVOCACY SKILL 273, 283 (Gladys W. Gruenberg ed., 1993). A former president of the National Academy of Arbitrators (NAA) referred to this "mournful dirge" as "galloping legalism." William P. Murphy, *Presidential Address: The Academy at Forty*, *in* ARBITRATION 1987, THE ACADEMY AT FORTY, PROCEEDINGS OF THE FORTIETH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1, 9 (Gladys W. Gruenberg ed., 1988). For defense of the trend, see, for example, Sam Kagel, *Legalism—and Some Comments on Illegalisms—in Arbitration*, *in* ARBITRATION 1985: LAW AND PRACTICE, PROCEEDINGS OF THE THIRTY-EIGHTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 180 (Walter J. Gershenfeld ed., 1986) [hereinafter ARBITRATION 1985]; J. David Andrews, *A Management Attorney's View*, *in* ARBITRATION 1985, *supra*, at 191.

United States; observers have pointed to the same trend in neighboring Canada.[5]

The central issue revolves around the factor of elapsed time; to the extent that a case takes longer from the filing of the grievance to the issuance of the award, costs mount up in terms of the expense of the arbitrator,[6] the parties' advocates, associated personnel (*e.g.*, witnesses), and related documentation (*e.g.*, transcripts). In discipline and discharge cases, the expense is magnified when the grievant succeeds in obtaining a monetary remedy, such as a back pay award. An additional cost is the effect of delayed dispute resolution on the morale of the workplace.[7] In recognition of the importance of prompt closure, the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes ethically obligates arbitrators to avoid delay by timely fulfilling present and future commitments, cooperating with parties to avoid delays, and adhering to stipulated time limits for rendering an award.[8]

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[5] *E.g.*, Maureen F. Fitzgerald, *Arbitration Is Okay*, 43 LAB. L.J. 623 (1992); Kenneth W. Thornicroft, *Accounting for Delay in Grievance Arbitration*, 44 LAB. L.J. 543, 546–47 (1993); PAUL WEILER, RECONCILABLE DIFFERENCES: NEW DIRECTIONS IN CANADIAN LABOUR LAW 110 (1980). Limited research confirms the existence of creeping legalism in grievance arbitration in Canada. The primary study published (reflecting cases only in Ontario) revealed a decline in the efficiency of labor arbitration from 1980–1990. Michel G. Picher & Ellen E. Mole, *The Problem of Delay at Arbitration: Myth and Reality*, *in* LABOUR ARBITRATION YEARBOOK 3, 39 (William Kaplan et al. eds., 1993).

[6] *Trends*, *supra* note 1, at 54 (finding that arbitration charges (per diem multiplied by charged days) increased 133%, in comparison to an inflation rate of 75.4%, between 1980 and 1993).

[7] *See, e.g.*, United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) ("The parties expect that . . . [the arbitrator's] judgment of a particular grievance will reflect . . . [the contract's] consequence to the morale of the shop . . . ."); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960) ("The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware." (citing Archibald Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MTN. L. REV. 247, 261 (1958))). Harking back to the original purpose of arbitration, Joseph Rose hypothesized that delays in grievance arbitration could result in wildcat strikes. Joseph B. Rose, *Statutory Expedited Grievance Arbitration: The Case of Ontario*, ARB. J., Dec. 1986, at 30, 33, *quoted in* Allen Ponak & Corliss Olson, *The Delays in Grievance Arbitration*, 47 REL. INDUSTRIELLES 690, 691 (1992).

[8] CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES § 2(J)(1)–(3) (American Arbitration Ass'n 1985) [hereinafter CODE OF PROFESSIONAL RESPONSIBILITY], *reprinted in* CODES OF PROFESSIONAL RESPONSIBILITY 447–58 (Rena A. Gorlin ed., 3d ed. 1994).

Other factors of undue legalism in arbitration proceedings include the parties' use of lawyers, their insistence upon transcripts and post-hearing briefs, and arbitrators' excessive citation of legal authorities in the awards.[9]

Several authors have advanced arguments both for and against the increasing use of lawyers in labor arbitration.[10] Similarly, while recognizing the value of transcripts in complicated cases, commentators have observed that transcripts contribute to both delays and increased costs.[11]

Acknowledging post-hearing briefs to be another contributing factor, various arbitrator-authors have pointed to the parties themselves as responsible for this trend.[12] Although briefs are sometimes helpful in summarizing the facts and the parties' positions,[13] and the Code of Professional Responsibility requires compliance with "mutual agreements in respect to the filing or non-filing of post-hearing briefs,"[14] nevertheless, arbitrators could contribute to the alleviation of legalization by only granting unilateral motions for filing of briefs when truly necessary. The few commentators who have criticized the overuse of precedents point out that stare decisis has limited applicability in arbitration as compared to litigation.[15]

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[9] Aaron, *supra* note 3, at 607–08; Anthony F. Bartlett, *Labor Arbitration: The Problem of Legalism*, 62 OR. L. REV. 195, 205 (1983); Stein, *supra* note 3, at 866.

[10] *E.g.*, Aaron, *supra* note 3, at 607; Alleyne, *supra* note 2, at 94–96; Bartlett, *supra* note 9, at 209; William Eaton, *Labor Arbitration in the San Francisco Bay Area*, 48 LAB. ARB. REP. 1381, 1381 (1967); Fitzgerald, *supra* note 5, at 633; Sylvester Garrett, *Are Lawyers Necessarily an Evil in Grievance Arbitration?*, 8 UCLA L. REV. 535, 537–45 (1961); Kochan, *supra* note 4, at 179; Mittenthal, *supra* note 1, at 28.

[11] *E.g.*, Aaron, *supra* note 3, at 607–10; Bartlett, *supra* note 9, at 208; Seitz, *supra* note 4, at 33–34.

[12] *E.g.*, Fitzgerald, *supra* note 5, at 632; Matthew M. Franckiewicz, *An Arbitrator's View of Writing Briefs*, 54 DISP. RESOL. J., Feb. 1999, at 59, 60; James H. Jordan, *Comment to George Nicolau's Can the Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense?*, *in* ARBITRATION 1986: CURRENT AND EXPANDING ROLES, PROCEEDINGS OF THE THIRTY-NINTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 92, 95 (Walter J. Gershenfeld ed., 1987);*Trends*, *supra* note 1, at 52–55; Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration*, 35 U. FLA. L. REV. 557, 623–24 (1983); Thornicroft, *supra* note 5, at 544.

[13] Aaron, *supra* note 3, at 608; Seitz, *supra* note 4, at 33–34; Peter A. Veglahn, *Arbitration Costs/Time*, 30 LAB. L.J. 49, 53 (1979).

[14] CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 8, § 6(A)(1).

[15] Some commentators associate this "external law debate" with the process of legalization. *E.g.*, Aaron, *supra* note 3, at 608; Bartlett, *supra* note 9, at 204; Garrett, *supra* note 10, at 541–42; Perry A. Zirkel, *The Use of External Law in Labor Arbitration*, 1985 DET. C.L. REV. 31, 41–43 (1985) [hereinafter *External Law*].

A long held consensus among scholars in the legal community has been that any upward trend in the above named factors, after the Braden model reached maturation,[16] would signify unwarranted legalism.[17]

The problem with this consensus, is its lack of grounding in terms of empirical evidence, systematic longitudinal research. Most commentators have made their evaluations based only on their experiences as arbitrators. For example, Alleyne admitted that his primary conclusion about legalization lacked "hard data."[18] There is a limited amount of relevant analyses of hard data (*i.e.* empirical research studies); however, these analyses are largely non-longitudinal,[19] attitudinal,[20] or peripheral.[21]

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[16] Although "maturation" in this context is not mathematically precise, it is a reasonably reliable measure in relation to institutions and processes. *See, e.g.*, NLRB v. Yeshiva Univ., 444 U.S. 672 (1980); Perry A. Zirkel & Katherine A. Pease, *Beyond* Yeshiva*: The Case for a Coordinated Approach to Faculty Bargaining*, 11 STETSON L. REV. 51 (1981).

[17] Dennis R. Nolan & Roger I. Abrams, *The Future of Labor Arbitration*, 37 LAB. L.J. 437, 439–40 (1986) (citing limited empirical data in AAA's former newsletter STUDY TIME for support, their specific conclusion was "that labor and management have just about reached the limits of legalism in the arbitration process.") [hereinafter *The Future*]; Garrett, *supra* note 10, at 541; Richard S. Rubin et al., *Creeping Legalism in Public Sector Grievance Arbitration: An Empirical Approach*, 27 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 383, 386 (1998). Fitzgerald also acknowledged the problem, but she identified Fleming as one of the few "produc[ing] statistics in this particular area." Fitzgerald, *supra* note 5, at 631. However, Fleming's study is outdated and lacks rigorous statistical analysis. *See* R. W. FLEMING, THE LABOR ARBITRATION PROCESS 27, 37, 59 (1965).

[18] Alleyne, *supra* note 2, at 96 n.13.

[19] *See, e.g.*, Harry T. Edwards, *Advantages of Arbitration over Litigation: Reflections of a Judge, in* ARBITRATION 1982: CONDUCT OF THE HEARING, PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 16, 23 (James L. Stern and Barbara D. Dennis eds., 1983); Jordan, *supra* note 12, at 97; Rubin et al., *supra* note 17, at 383; Straus, *supra* note 4, at 209; *cf.* Picher & Mole, *supra* note 5 (Ontario, Canada).

[20] *See, e.g.*, Alexander & Widenor, *supra* note 4; Arthur E. Berkeley, *Arbitrators and Advocates: The Consumers' Report, in* ARBITRATION 1988: EMERGING ISSUES FOR THE 1990S, PROCEEDINGS OF THE FORTY-FIRST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 290, 297–98 (Gladys W. Gruenberg ed., 1989); Dallas L. Jones & Russell A. Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments*, 62 MICH. L. REV. 1115, 1140 (1964); *cf.* Veglahn, *supra* note 13 (attitudes and practices).

[21] Some studies concerning characteristics of arbitrators include data on whether the arbitrators were lawyers. However, they are non-longitudinal, and their wide variation in not only sampling but also definitions precludes any valid trend analysis. *See, e.g.*, James P. Begin & Michael Zigarelli, 1994 National Academy of Arbitrators Research

The studies that come closest to providing systematic, longitudinal analysis of one or more of the characteristics of legalization are limited in number and rigor.[22] In 1990, Jack Stieber presented a longitudinal analysis of the Federal Mediation and Conciliation Service (FMCS) cases for the period between 1963–1987.[23] Corresponding elapsed time from filing to award data from the American Arbitration Association (AAA) were also included, but only for the years 1987 and 1988. Stieber's study was limited because of missing data for one year, aggregation into five-year periods, and the absence of sophisticated statistical techniques. In fact, Steiber himself cited the need for "more and better statistics on elapsed time in grievance arbitration cases."[24] Finally, summary reports in the AAA's former newsletter show an upward trend with regard to party representation by attorneys, use of transcripts, and frequency of post-hearing briefs. However, the total period was only eight years, the data included overlaps and gaps, and the sampling specifications were not uniform.[25]

Committee Membership Survey 2–5 (Apr. 1995) (unpublished document, on file with author); Charles J. Coleman & Perry A. Zirkel, *The Varied Portraits of the Labor Arbitrator*, *in* LABOR ARBITRATION IN AMERICA 19, 22–23 (Mario F. Bognanno & Charles J. Coleman eds., 1992). Several studies concerning selection of arbitrators included data on whether the parties consider a law degree an important attribute of an arbitrator. *See, e.g.*, Steven Stambaugh Briggs & John C. Anderson, *An Empirical Investigation of Arbitrator Acceptability*, 19 INDUS. REL. 163, 169 (1980); Eric W. Lawson, Jr., *Arbitrator Acceptability: Factors Affecting Selection*, 36 ARB. J., Dec. 1981, at 22, 24; Richard P. Shore, *Conceptions of Arbitrator's Role*, 50 J. APPLIED PSYCHOL. 172, 177 (1966). Even less related, one study included whether arbitrators who were attorneys had different compensation schedules than those who were not attorneys. Donald J. Petersen & Julius Rezler, *Fee Setting and Other Administrative Practices of Labor Arbitrators: Study by Professors Petersen and Rezler of Loyola University of Chicago*, 68 LAB. ARB. REP. 1383, 1384–87 (1977).

[22] Some sources include limited longitudinal data, but only as an incidental footnote. *E.g.*, Alleyne, *supra* note 2, at 95 n.12. Other sources provide comparisons based on a very short durational period (two years). *See, e.g.*, *Trends*, *supra* note 1, at 53–56; Nolan & Abrams, *supra* note 12, at 624; Ponak & Olson, *supra* note 7, at 693; Arthur Ross, *The Well-Aged Arbitration Case*, 11 INDUS. & LAB. REL. REV. 262 (1958); *cf.* Daniel F. Jennings & A. Dale Allen, Jr., *Labor Arbitration Costs and Case Loads: A Longitudinal Analysis*, 41 LAB. L.J. 80 (1990) (cost factors).

[23] Jack Stieber et al., *Elapsed Time in Grievance Arbitration*, *in* ARBITRATION 1990, NEW PERSPECTIVES ON OLD ISSUES, PROCEEDINGS OF THE FORTY-THIRD ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 128 (Gladys W. Gruenberg ed., 1991).

[24] *Id.* at 141.

[25] Issues of the AAA's quarterly newsletter, STUDY TIME, provide the following data for the period 1981–1989:

III. METHOD

The purpose of this study is to determine whether there is an identifiable upward trend in the various factors used to reflect the extent of legalism in grievance arbitration cases. This study is based on the data provided by the FMCS in its annual reports and in the unpublished annual statistics compiled by its Office of Arbitration Services.[26] The specific variables include the following:

1. Elapsed time
   a. average duration of the pre-hearing phase[27]
   b. average duration of the hearing/post-hearing phase[28]
   c. total average duration (*i.e.*, the sum of pre-hearing and hearing/post hearing phases)

Period Start	Period End	Employer Rep. by Attorney	Union Rep. by Attorney	Briefs	Transcripts
Sept. 1981	July 1982	70%	47%	48%	15%
May 1982	Oct. 1982	72%	48%	54%	14%
June 1983	July 1984	73%	51%	57%	18%
Aug. 1984	Aug. 1985	73%	52%	59%	21%
Jan. 1986	Dec. 1986	78%	54%	58%	22%
Jan. 1987	Oct. 1987	78%	56%	59%	20%
Oct. 1988	Jan. 1988	81%	54%	64%	22%
Jan. 1989	Oct. 1989	82%	54%	69%	23%

STUDY TIME, (A.B.A., New York, N.Y.), July 1982; STUDY TIME, (A.B.A., New York, N.Y.), Oct. 1984; STUDY TIME, (A.B.A., New York, N.Y.), Jan. 1986; STUDY TIME, (A.B.A., New York, N.Y.), 1987; STUDY TIME, (A.B.A., New York, N.Y.), 1988; STUDY TIME, (A.B.A., New York, N.Y.), 1989.

[26] Both sources provide data for elapsed time and charged time, but only the unpublished annual statistics provide the data for transcripts and briefs. In addition, the unpublished annual statistics have served as the primary basis for FMCS' annual reports. In relatively limited cases there were discrepancies between the two overlapping sources of the data for this study. For our resolution of each discrepancy, see *infra* notes 33–34. For 1997 and 1998, the Office of Arbitration Services provided the data directly to the authors inasmuch as these data are no longer compiled in its published or unpublished annual statistics.

[27] This phase consists of the following successive categories as defined by FMCS: grievance filing until request for panel, panel request until panel sent, panel sent until appointment of arbitrator, and appointment of arbitrator until hearing.

[28] This phase amounts to the FMCS category reported in its annual reports as "hearing until award rendered by arbitrator."

2. Charged time
   a. hearing
   b. study
   c. total days charged[29]
3. Transcripts taken[30]
4. Briefs filed[31]

FMCS based its data for the variables in category one (elapsed time) on a random sample of the arbitrator case reports, whereas its data for factors two through four (charged time, transcripts taken, briefs filed) were based on *all* arbitrator case reports that FMCS received.[32] In addition, the starting and ending dates for each variable depended on the extent that the data were available from FMCS.

We analyzed these data descriptively and inferentially. More specifically, after a tabular summary for each factor, we have arranged the data graphically in corresponding Figures. Each Figure corresponds to a respective Table and demonstrates the Ordinary Least Squares (OLS) results for each variable regressed against time, along with the value of the coefficient of determination (r^2). This coefficient is the most commonly used measure of the goodness of fit of a regression line; it measures the proportion of the total variation in the dependent variable that is explained by the regression model. The range for the coefficient of determination is from 0, representing no fit, to 1.0, signifying a perfect fit. Finally, for inferential purposes, a fourth Table reports the *t*-values for each estimated regression slope coefficient, along with the designation of statistical significance for a two-tailed hypothesis at the 0.05 and 0.01 level.

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[29] This sum includes not only hearing and study, but also travel time, as reported and billed by arbitrators. We did not separately analyze travel time because it was relatively limited and is not, compared with hearing and study time, related to legalization.

[30] This variable is represented as a percentage (rather than average number) of cases per year.

[31] This variable is also reported as a percentage, where at least one party filed a brief, according to the arbitrator's case report.

[32] Due to a change in leadership, FMCS stopped collecting and compiling the randomly sampled elapsed time data in 1997. Telephone conversation with Gary Hattal, then Director of FMCS' Office of Arbitration Services (Feb. 3, 2000).

IV. FINDINGS

Table 1 provides the average annual elapsed time for the pre-hearing and hearing/post-hearing phases as well as their total.

Table 1. Average Elapsed Time

Year	Pre-Hearing Phase[33]	Hearing/Post-Hearing Phase[34]	Total Days[35]
1970	196.6	49.0	245.6
1971	203.8	47.1	250.9
1972	195.1	46.4	241.5
1973	208.4	48.7	257.1
1974	199.8	52.0	251.8
1975	180.6	42.6	223.2
1976	187.7	45.8	233.5
1977	216.1	52.2	268.3
1978	191.1	48.9	240.0

[33] The elapsed time for the pre-hearing phase is the sum of the categories reported in the unpublished annual statistics compiled by FMCS' Office of Arbitration Services for 1970–1996. *See supra* note 26. We found three discrepancies between the pre-hearing phase numbers derived from this unpublished source and those published in FMCS' annual reports. First and second, for 1988 and 1989 the pre-hearing phase numbers published in FMCS' annual reports appear to be erroneous due to incorrect addition. Third, FMCS' annual report for 1996 incorrectly listed the 1997 pre-hearing numbers, as we discovered by summing the unpublished numbers for 1996. Thus, we resolved limited discrepancies in favor of the unpublished annual statistics.

[34] We derived the entries for the hearing/post-hearing phase from the unpublished annual statistics. Specifically, each of these entries represents the difference between (1) panel request until award rendered by arbitrator and (2) the sum of the three successive subcategories—panel request until panel sent, panel sent until appointment of arbitrator, and appointment of arbitrator until hearing. Again, we found some discrepancies between the two sources of data. First, the annual reports erroneously listed the "hearing until brief" numbers from the unpublished annual statistics as the hearing/post-hearing phase for 1978-1987. Thus we used the unpublished data, per the aforementioned derivation procedure, for the hearing/post-hearing phase. Second, starting in 1988, FMCS introduced a new category in its unpublished annual statistics. This category is the time elapsed from hearing until award, which matches the definition herein of the hearing/post-hearing phase. However, for the period 1988-1996, the numbers for the newly introduced category were close but not equal to the numbers derived from our established procedure. After repeated consultations with the representatives of FMCS failed to resolve the nature of this discrepancy, we relied on the unpublished data for the sake of internal consistency.

[35] The entries for "total days," which represent the sum of pre-hearing and hearing/post-hearing phases, do not necessarily coincide with those published in FMCS' annual reports due to the aforementioned discrepancies in the component categories. *See supra* notes 32–33.

1979	195.9	51.0	246.9
1980	191.5	52.2	243.8
1981	196.7	50.7	247.4
1982	253.0	65.5	318.5
1983	292.7	79.2	371.9
1984	276.4	77.8	354.2
1985	332.1	70.4	402.5
1986	279.7	65.7	345.4
1987	281.9	64.6	346.5
1988	224.5	50.6	275.1
1989	248.9	40.4	289.3
1990	261.7	49.4	311.1
1991	303.7	61.1	364.9
1992	249.7	67.0	316.6
1993	251.4	61.9	313.3
1994	266.0	60.4	326.4
1995	261.9	66.9	328.7
1996	244.5	57.5	302.0
1997	244.8	67.0	311.8

Table 1 reveals that despite considerable variation, for each of the elapsed time variables, the trend tentatively appears to be upward. Table 2 presents the annual averages for hearing, study, and total number of days charged.

Table 2. Average Number of Days Charged by Arbitrators

Year	Hearing	Study	Total Days Charged
1970	0.92	1.66	2.93
1971	0.92	1.65	2.96
1972	0.91	1.69	2.96
1973	0.92	1.72	2.96
1974	0.93	1.73	3.00
1975	0.93	1.67	2.92
1976	0.89	1.67	2.88
1977	0.87	1.76	2.96
1978	0.99	1.78	3.08
1979	0.99	1.82	3.14
1980	1.00	1.88	3.21
1981	1.00	1.98	3.30
1982	1.01	2.01	3.37
1983	1.02	2.04	3.40
1984	1.04	2.04	3.41
1985	1.05	2.09	3.49
1986	1.04	2.08	3.48
1987	1.04	2.00	3.39
1988	1.11	2.15	3.64
1989	1.12	2.24	3.80
1990	1.11	2.29	3.79

1991	1.06	2.27	3.70
1992	1.08	2.31	3.80
1993	1.14	2.33	3.84
1994	1.13	2.33	3.86
1995	1.20	2.33	3.94
1996	1.12	2.43	3.98
1997	1.13	2.33	3.86
1998	1.10	2.30	3.74

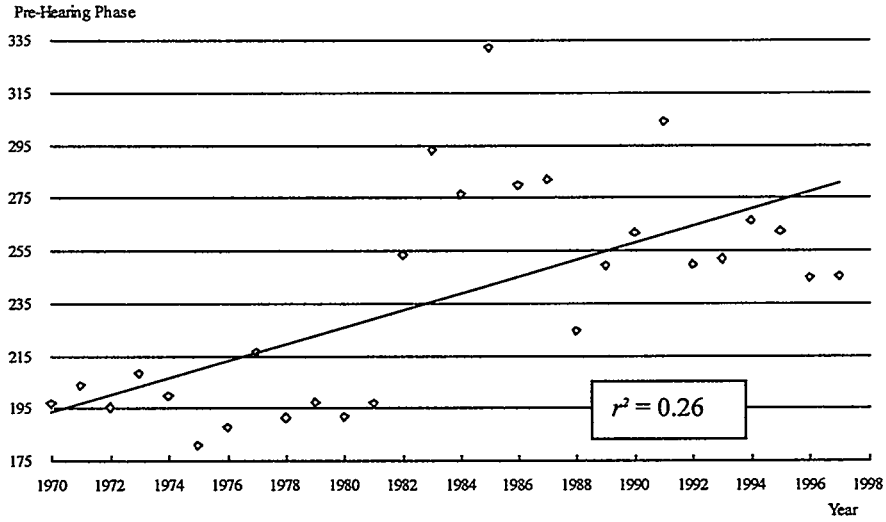
Table 2 also reflects an overall upward trend, with less variation than in Table 1. Finally, Table 3 reports the percentage of cases in which transcripts were taken and briefs were filed.

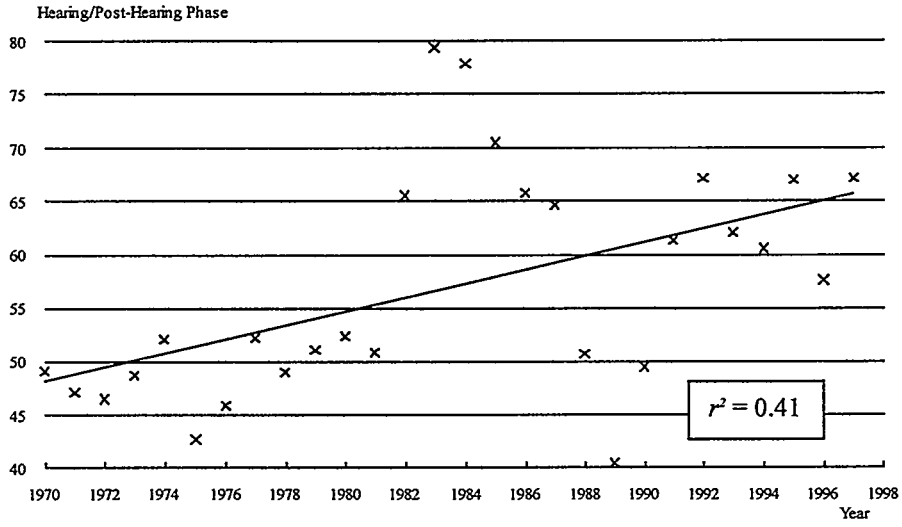
Table 3. Percentage of Cases with Briefs and Transcripts

Year	Transcripts Taken	Briefs Filed
1974	28.1%	43.4%
1975	27.7%	68.4%
1976	25.7%	67.2%
1977	23.8%	66.9%
1978	24.1%	65.7%
1979	24.9%	67.2%
1980	27.4%	70.0%
1981	29.3%	72.3%
1982	28.6%	73.7%
1983	28.1%	73.4%
1984	29.3%	74.3%
1985	29.9%	74.3%
1986	29.0%	75.0%
1987	29.6%	75.7%
1988	26.8%	75.6%
1989	30.0%	76.1%
1990	29.1%	76.0%
1991	19.6%	84.5%
1992	36.6%	94.4%
1993	10.4%	89.6%
1994	10.6%	94.2%
1995	9.5%	94.9%
1996	26.2%	70.2%
1997	29.0%	78.9%
1998	41.7%	77.0%

Table 3 suggests an up-and-down trend for transcripts, and a general, but inconsistent, upward trend for briefs. Figure 1 depicts the plot of the fitted linear trend along with the r^2 value for the annual average elapsed time for each of the phases and their total.

Figure 1. OLS and r^2 Results for Annual Average Elapsed Time: Pre-Hearing, Hearing/Post-Hearing Phases, and Total





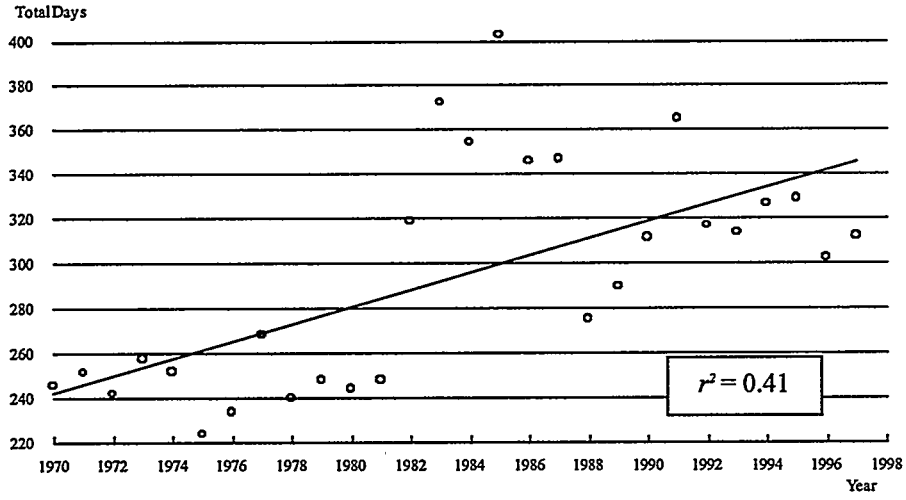
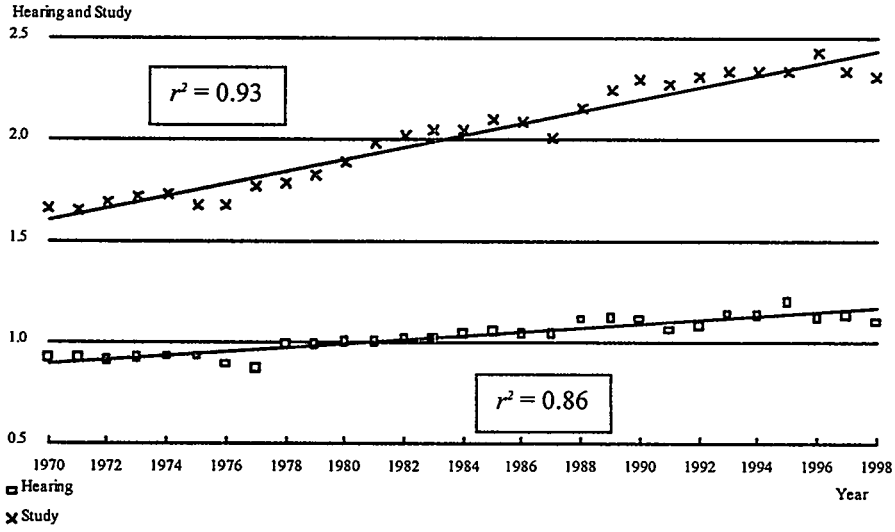


Figure 1 demonstrates that there is considerable variation for each of the components and thus, for the total elapsed time. More specifically, each r^2 value is comparatively small, reflecting a bad fit, especially in the case of the hearing/post-hearing phase. Examination of the data points reveals that the dispersion was particularly notable in the mid 1980s and that, although largely parallel for each of the two component phases, the variation was particularly pronounced for the hearing/post-hearing phase for the 1981–1990 decade. Figure 2 contains the regression results for average days charged by arbitrators in terms of hearing and study, and their total in terms of time charged.

Figure 2. OLS and r^2 Results for Annual Average Days Charged by Arbitrators: Study, Hearing, and Total



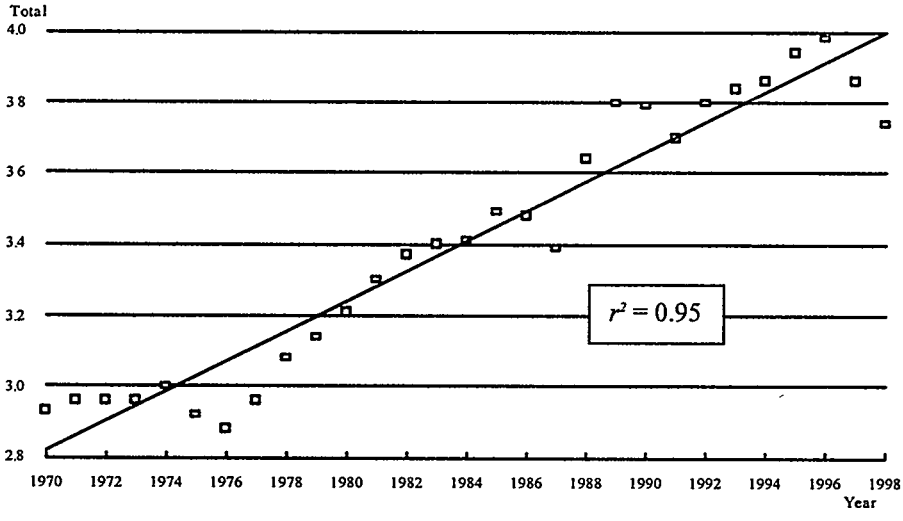
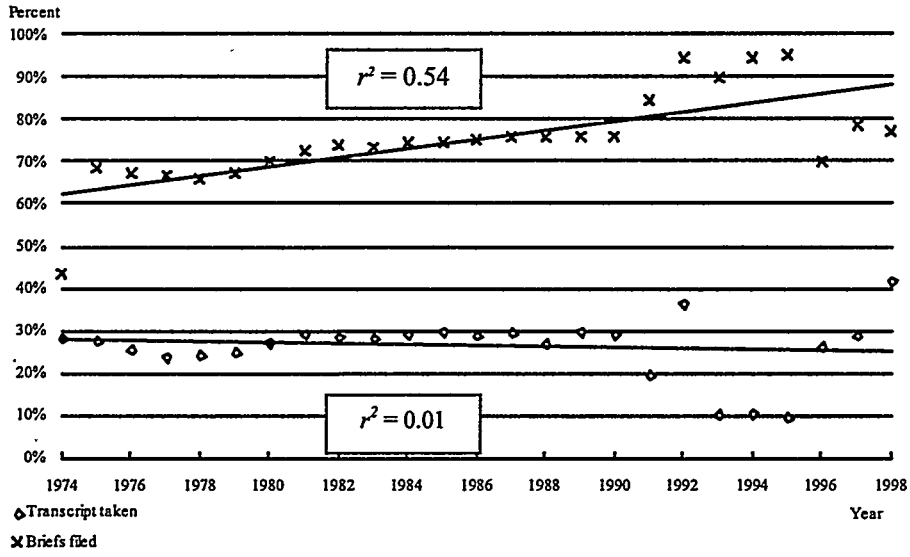


Figure 2 reveals strongly consistent upward trends for all variables, with the value of the coefficient of determination being close to .9. In light of the upper boundary for the statistic, the linear time-trends explain a large portion

of variation in each dependent variable. Figure 3 presents results derived from a regression model for transcripts and briefs.

Figure 3. OLS and r^2 Results for Percentage of Cases with Briefs and Transcripts



The regression line in Figure 3 exhibits an upward trend for briefs, with a relatively good fit represented by a r^2 value of 0.54. In contrast, the trend line for transcripts has a negative slope with a very low value of the coefficient of determination ($r^2 = 0.01$), revealing a high degree of variation. Inspection of the data points reveals that this variation is largely attributable to the period since 1990. Table 4 provides the *t* values to determine whether each of the fitted trend lines has a slope that is statistically different from zero (*i.e.*, whether each individual factor changed significantly over time).

Table 4. Values of *t*-statistic (*t*) for the Estimated Slope Coefficients of OLS Linear Regression Models[36]

Variable	Period	*t*
Elapsed Time:	1970-1997	
Pre-Hearing Phase		2.22 *
Hearing/Post Hearing Phase		1.65
Total Days		2.12 *
Days Charged:	1970-1998	
Hearing		9.48 **
Study		10.60 **
Total Days Charged		7.16 **
Other:	1974-1998	
Transcripts Taken		-0.09
Briefs Filed		4.16 **

* $p < 0.05$
** $p < 0.01$

Table 4 reveals that all of the selected variables, except hearing/post-hearing time and transcripts, have slopes that are statistically significant at least at the 0.05 level. Moreover, the variables in the category of annual average days charged by arbitrators are statistically significant at the 0.01 level. Thus, the null hypothesis that each variable remained constant was rejected except for hearing/post-hearing time and transcripts.

V. DISCUSSION

Based on the most comprehensive and thorough empirical analysis to date, the conclusion is clear that, except for two exceptions, legalization has continued to creep upward from the early 1970s to the late 1990s. Therefore, contrary to Nolan and Abrams' prediction, the limits of legalism were not reached in the 1980s.[37] The first exception is the use of transcripts, which has

[36] The Durbin-Watson *d* test revealed the presence of autocorrelation in all regressions. To correct for autocorrelation, we used Cochrane-Orcutt iteration procedure, which includes Preis-Winsten transformation, under the commonly accepted assumption of the first-order autoregressive scheme, AR(1). The resulting corrected *t*-values are generally acceptable, although caution is warranted because the sample sizes are not very large.

[37] *The Future*, *supra* note 17.

remained largely constant since 1970, albeit with considerable up-and-down variation since 1990. The second exception is for the hearing/post-hearing phase, which reflected particular dispersion in the 1981–1990 decade; although its trend line was not significantly upward or downward for the entire twenty six year period, the other component and the total for elapsed time was upward on a statistically significant basis.[38] The goodness of fit and the statistical significance for the other factors—days charged (study, hearing, and, thus, total) and post-hearing briefs filed—provided stronger evidence of an upward trend.

Unfortunately, corresponding systematic data for the other major accepted factors of what has been alternatively termed "incremental formalism"[39]—the use of attorneys to represent one or both parties—is not available. The various studies that have included this variable are too widely varied in sampling procedure to provide a coherent longitudinal picture.[40]

Moreover, the limited available research is inconclusive as to whether the use of attorneys contributes to other indicia of legalism.[41]

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[38] "Generalizable" in this context refers to the high probability that the result for this sample applies to the total population of grievance arbitration awards.

[39] *See* Alleyne, *supra* note 2, at 106.

[40] Moreover, the vast majority of these studies have found that the use of attorneys as party representatives is not significantly related to which side wins. *Compare* Richard N. Block & Jack Stieber, *The Impact of Attorneys and Arbitrators on Arbitration Awards*, 40 INDUS. & LAB. REL. REV. 543, 553–54 (1987) (examining award tended to be more favorable when either party was exclusively represented than when neither party was represented by an attorney), *and* Perry A. Zirkel & Chad C. Miller, *Grievance Arbitration in K–12 Education Cases: Do Selected Case Characteristics Make A Difference*, 28 J. COLLECTIVE NEGOTIATIONS IN THE PUB. SECTOR 295, 300 (1999) (concluding that the award tended to be more favorable when neither side was represented than when either side exclusively was represented by an attorney), *with* Frank R. Annunziato, *Grievance Arbitration in Connecticut K–12 Public Education*, 42 ARB. J., Sept. 1987, at 46, 51, *and* Herbert Kritzer, *"First Thing We Do, Let's Replace All the Lawyers": A Comparison of Lawyers and Nonlawyers as Advocates* (1995) (working paper DPRP 11-9, University of Wisconsin-Madison Law School Institute for Legal Studies), *and* Perry A. Zirkel, *A Profile of Grievance Arbitration Cases*, 38 ARB. J., Mar. 1983, at 35, *and* Perry A. Zirkel & Philip H. Breslin, *Correlates of Grievance Arbitration Awards*, 24 J. COLLECTIVE NEGOTIATIONS IN THE PUB. SECTOR 45, 51–52 (1995). Similarly, the wide variation in sampling and definitions in the non-longitudinal studies to date preclude a reliable outcome-trend analysis of the related indicator, the use of arbitrators who are attorneys. *See* Begin & Zigarelli, *supra* note 21; Coleman & Zirkel, *supra* note 21.

[41] *See* Allen Ponak et al., *Using Event History Analysis to Model Delay in Grievance Arbitration*, 50 INDUS. & LAB. REL. REV. 105, 119 (1996) (stating that only at scheduling stage does legal counsel contribute to delay and the opposite is true at the award stage); Stieber et al., *supra* note 23, at 137 (stating that attorney representation with the presence of post-hearing briefs corresponds closely but does not increase elapsed

The database for this study is not without limitations. For example, FMCS is only one major source of arbitration awards; others are the AAA, private panels, direct appointments, and state agencies.[42] Moreover, the FMCS data are not free from imperfections. For example, in addition to the identified soft spots,[43] the response rate is less than complete.[44] Nevertheless, it is far superior to the alternatives,[45] because it is the most comprehensive longitudinal database available, encompassing unpublished as well as published awards, a broad range of sectors, and a national scope.

Similarly, the variability for the selected factors, particularly in recent years, suggest the possible alternative of a second degree polynomial or reciprocal regression model for the elapsed time. Utilizing these alternative regression techniques allows for the possibility of a trend that has a decreasing slope toward its end. However, no theory warrants the choice of a particular functional form of the regression and for most of the factors the linear regression produces a more fitting explanation.

With these caveats in mind, the specific findings of this study have both practical as well as academic implications. Analyzing the trend of over-judicialization, Bartlett speculated: "If this legalism could be quantified, the outcry against this threat to the labor arbitration process might be more widespread."[46] Perhaps the tentativeness of Bartlett's prediction is warranted;

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time); Kenneth Thornicroft, *Sources of Delay in Grievance Arbitration*, 8 EMPLOYEE RESPONSIBILITIES & RTS. J. 57 (1995) (significant source of elapsed time).

[42] For the share of the total grievance cases in 1986 for each source, see Charles J. Coleman, *The Arbitrator's Cases: Number, Sources, Issues, and Implications*, *in* LABOR ARBITRATION IN AMERICA 85, 94 (Mario F. Bognanno & Charles J. Coleman eds., 1992). According to Coleman's estimate, private panels accounted for the highest number of cases for 1986, followed by FMCS. *Id.* at 93. Nolan and Abrams reported that permanent umpireships have declined in favor of private panels, and they listed the National Mediation Board as a limited, additional source of cases. *Trends*, *supra* note 1, at 57, 68

[43] *See supra* notes 33–34. Such seeming glitches may be attributable to changes in personnel, practice, or policy. For example, the recent policy change to a fee for participating in the FMCS arbitral appointment system may cause variation in future longitudinal studies. A new era was marked in 1998 with notable changes in the number of panel requests and arbitrator appointments. Walt Gershenfeld, *The FMCS Numbers*, CHRON., Winter 2000, at 20.

[44] *Trends*, *supra* note 1, at 70. On the other hand, the FMCS case activity reports are integrated in the arbitrator's billing form, thus enhancing the probabilities of return.

[45] For example, AAA discontinued the systematic collection of case activity reports years ago and only recently re-established a research function. Correspondence between Richard Naimark, Vice-President AAA, and author (Mar.–July 1999) (on file with author).

[46] Bartlett, *supra* note 9, at 226 n.151.

the problem is that, as with grade inflation,[47] the various constituencies not only contribute to but also benefit from this trend in terms of self-interest.[48] Nevertheless, although we may be another *vox clamantis in deserto*,[49] we interpret these findings in resounding resonance with grievance arbitration's institutional interest in being distinctively expedited and economical.

The overall findings are not defensible in terms of "moth-eaten rationalizations,"[50] such as the choice of the Braden model rather than the Taylor model, the reciprocal finger-pointing between the arbitrators and the parties, and the requirements of external law. The Braden model had ample time to reach maturation[51] by the 1980s.[52] Similarly, the responsibility of arbitrators and party representatives are mutual, not mutually exclusive. Although *Alexander v. Gardner-Denver Co.*[53] and other case law has caused the need for transcripts or other measures of formality,[54] their effect has been limited both in scope and time.[55]

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[47] *See* Perry A. Zirkel, *Grade Inflation: A Leadership Opportunity for Schools of Education?*, 101 TCHRS. C. REC. 247, 255 (1999) (discussing grade inflation and the problems that surround it).

[48] For example, it is in the interest of the arbitrator not to decline appointments to cases, rather than defer them to a later date, due to a busy schedule and to risk alienating either party by running counter to the norm with regard to other delay- and cost-reduction techniques. It is similarly in the interest of the lawyer-representative to use transcripts, post-hearing briefs, and extended scheduling.

[49] *See, e.g.*, William P. Murphy, *Academy History: Highlights and Sidelights, in* ARBITRATION 1997 THE NEXT FIFTY YEARS: PROCEEDINGS OF THE FIFTIETH ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS 30, 40 (Joyce M. Najita ed., 1998) [hereinafter ARBITRATION 1997] ("Well, perhaps Eva [Robins] and others who share her view are shouting against the wind, but who knows?").

[50] Davey, *supra* note 4, at 223.

[51] *See supra* note 16 and accompanying text.

[52] *See, e.g.*, *The Future*, *supra* note 17.

[53] Alexander v. Gardner-Denver Co, 415 U.S. 36, 60 n.21 (1974).

[54] *See, e.g.*, Bartlett, *supra* note 9, at 210–25; *cf.* Theodore St. Antoine, *The Law of Arbitration, in* LABOR ARBITRATION UNDER FIRE 1, 22–26 (James L. Stern & Joyce M. Najita eds., 1997).

[55] *See, e.g.*, Charles J. Coleman, *Invited Paper: Mandatory Arbitration of Statutory Issues: in* Austin, Wright *and the Future, in* ARBITRATION 1998: THE CHANGING WORLD OF DISPUTE RESOLUTION PROCEEDINGS OF THE FIFTY-FIRST MEETING, NATIONAL ACADEMY OF ARBITRATORS 134, 148 (Steven Briggs & Jay E. Grenig eds., 1999); *Cornell Survey Results Aired at Montreal*, CHRON., Summer 2000, at 6; Michelle Hoyman & Lamont E. Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of* Gardner-Denver, 39 ARB. J., Sept. 1984, at 49, 55 (discussing the effect of *Gardner-Denver* on parties seeking review of arbitration discussions); *External Law*, *supra* note 15, at 41–43.

As for the specific findings, the significant upward trend for total elapsed time is troubling in terms of the age-old axiom about justice delayed being justice denied.[56] Although largely, if not entirely, attributable to the pre-hearing phase, where increasing involvement of lawyers may be a primary contributing factor, the parties and the arbitrator cannot deny a significant share of the responsibility. The parties decide on the use of lawyers and, with or without, legal representation, can put a priority on prompt scheduling.[57] Arbitrators, even in cases scheduled by outside agencies, similarly may push the parties and themselves for earlier and firmer hearing dates.

Even the more significantly upward trend for days billed is subject to mitigation by the arbitrators and the parties. Arbitrators could limit hearings to one day more often[58] by insisting on it from their initial words and actions[59]—placing serious emphasis on concise opening statements, parsimonious objections, efficient stipulations, non-redundant testimony, and staying until closure.[60] Similarly, arbitrators should take the offensive, rather than the defensive, in relation to the statistically significant upward slope of charged study days. Part of the answer appears to be keeping hearing days to a minimum. However, another part is being more efficient about study days; the ratio between study and hearing days has increased from consistently less than 2:1 to generally more than 2:1 since the mid 1980s.[61] Conversely, the parties have an obvious role in escalating or mitigating the charged hearing and study day by providing more than lip service to controlling these key costs of arbitration.

The similarly statistically significant upward trend line for the filing of post-hearing briefs is clearly within the control of the parties and subject to

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[56] This application of this aphorism is not new to us. *See* Newman & Wilson, *supra* note 4, at 42; Thornicroft, *supra* note 5, at 543.

[57] Ponak & Olson, *supra* note 7, at 703 (suggesting that delays could be significantly delayed by adopting and adhering to more expeditious procedures for selecting arbitrators and scheduling hearings).

[58] It is indeed surprising, to some observers at least, that the hearings averaged less than one billed day until 1980. *See supra* tbl.2.

[59] "Initial" in this context includes pre-hearing communications to both parties, even where AAA, FMCS, or another such agency is the intermediary.

[60] In the senior author's experience, which encompasses more than twenty years as a labor arbitrator, albeit on a part-time basis, when the parties know that the arbitrator "means business" about keeping the hearing to one day, by starting early or staying into the evening hours if necessary, in most cases the hearing is completed without having to resort to either of these announced alternatives.

[61] *See supra* tbl.2.

arbitral passivity or activism.[62] Although opining that "the process would be greatly improved if the filing of briefs were confined to the few cases of exceptional complexity" and observing that "I cannot recall a case in which the brief was decisive," former National Academy of Arbitrators (NAA) president William Murphy predicted that the prevailing trend would continue.[63] His prophecy may be correct, but it is, at least in part, self-fulfilling. He explained that he does not provide the parties with his view unless asked; yet, we suggest that being bold enough to serve as an active conscience to the parties of the economical and expedited *raison d'etre* of grievance arbitration can dampen, if not reverse, the trend. The parties must play the primary role in preparing an effective closing argument and making post-hearing briefs the clear exception rather than the increasing rule. Murphy is probably right in pointing the finger at management lawyers, "attuned by tradition and billable hours to the filing of briefs," as the lead players,[64] but the employer-client, their union counterparts, and even the arbitration literature also play contributing roles.

Although we found that the use of transcripts did not experience a significant upward trend, they did not, contrary to the conclusion of Nolan

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[62] For example, in responding to a one-sided request for post-hearing briefs, one leading arbitrator described his controversial but useful technique of offering the opposing party the option of presenting closing arguments ex parte. I. B. Helburn, *The End Is Near: A Note on Effective Closure*, *in* ARBITRATION 1997, *supra* note 49, at 272, 273.

[63] William P. Murphy, *The Ten Commandments for Advocates How Advocates can improve the Labor Arbitration Process*, *in* ARBITRATION 1992: IMPROVING ARBITRATION ADVOCACY SKILLS PROCEEDINGS OF THE FORTY-FIFTH MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 253, 261 (Gladys W. Gruenberg ed., 1993); *see* Jennings & Allen, *supra* note 22, at 85 (showing that 63% of 1987 NAA sample, as compared to 44% of 1975 NAA sample, favored elimination of post-hearing briefs as a cost-reduction technique); Joseph Brandschain, *Preparation and Trial of a Labor Arbitration Case*, *in* ARBITRATING LABOR CASES 125, 154 (Noel Levin et al. eds., 1974) (declaring that the filing of briefs is "often merely a wasteful delaying tactic"); Franckiewicz, *supra* note 12, at 60–61 (estimating that "more than 95% of post-hearing briefs make no difference to the outcome" but they have become "the default method of closing argument in labor arbitration"). Seitz, *supra* note 4, at 34, went a step further by questioning the prevailing assumption that the parties have a "right" to file post-hearing briefs.

[64] Murphy, *supra* note 63. Indeed, in his reply to Murphy's presentation, management attorney Robert J. Berghel insisted that briefs will be even more the norm in the future. Robert J. Berghel, *Management Perspective*, *in* ARBITRATION 1992: IMPROVING ARBITRATION AND ADVOCACY SKILLS: PROCEEDINGS OF THE FORTY-FIFTH MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 267, 272 (Gladys W. Grunchbag ed., 1993). The primary basis for his argument was Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

and Abrams' more limited analysis, "decline[] dramatically."[65] The explanation is not solely economic,[66] for the other factors, such as post-hearing briefs and billed days, are also expensive. Those who practice as well as profess techniques to halt the trend toward creeping legalism[67] are likely to view this result as a positive sign, but the generally obverse valence of the other factors suggest a more complex explanation, which would benefit from further research.

The recommendation for more research suggests the need for more precise questions and more refined measurements.[68] The recent re-establishment of a research arm at AAA[69] is a promising sign but the results will depend upon resources, focus, and leadership. The recent changes in the leadership of FMCS's Office of Arbitration Services may represent a step forward or backward in terms of relevant research and action. Finally, the NAA can continue to play an influential role in exposing and evaluating pertinent policy issues[70] and institutional solutions.[71]

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[65] *Trends*, *supra* note 1, at 53. They used only two years, 1980 and 1994, thus missing the trend of a longer and more complete set of data points. Similarly, revealing the problem of relying solely on individual experience, Murphy, characterized the trend as downward. Murphy, *supra* note 63, at 261.

[66] To the extent that it is economic, one Union representative explained the rationale with aplomb:

> [P]eople forget the *"E" for Economy* in arbitration: union advocates are paid usually by the year; arbitrators are paid by the day; employer's counsel are paid by the hour; and court reporters are paid by the page! Where would you start if you wanted to save money?

Shawn C. Keenan, *Union Perspective*, *in* ARBITRATION 1996 AT THE CROSSROADS: PROCEEDINGS OF THE FORTY-NINTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 114, 119 (Joyce M. Najita ed., 1997).

[67] For example, responding to one-sided requests for the use of a transcript, an experienced arbitrator suggested the technique of refusing to accept a copy unless one is given to the opposing side, gratis. Edgar A. Jones, Jr., *Selected Problems of Procedure and Evidence*, *in* ARBITRATION IN PRACTICE 48, 61 (Arnold M. Zack ed., 1984).

[68] For example, Alleyne, *supra* note 2, at 94, hypothesized that elapsed time may be inversely related to case complexity, but the "ambiguous" findings by Ponak suggest the need for caution in hypotheses about and measures of complexity. Ponak et al., *supra* note 41, at 117.

[69] *See supra* note 45 and accompanying text.

[70] For example, recent NAA president Rubin raised the question of whether the Academy inadvertently extended the creep of legalism by adopting the Protocol and the Guidelines for employer-promulgated grievance arbitration. Milton Rubin, *Presidential Address Where Have We Been? Where Are We Going? Do We Know?*, *in* ARBITRATION 1998 THE CHANGING WORLD OF DISPUTE RESOLUTION: PROCEEDINGS OF THE FIFTY-FIRST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1, 6–7 (Steven Biggs & Jay E.

The choices, as Nicolau eloquently elaborated, are a trade-off.[72] Now that the problem is at least preponderantly proven and the remedies are amply available,[73] it is left to the arbitrators, the parties, and the supporting organizations to demonstrate the requisite concerted commitment.[74] In his response to Nicolau's suggested solutions, labor attorney Tom Jennings addressed all sides—including arbitrators—with this fitting conclusion: "It does no good to bemoan the negative effect of excess adversarial exuberance, needless witnesses, and useless briefs and transcripts unless one is willing to do something about it."[75]

Grenig eds., 1999). In doing so, he recommended reexamination of this issue: "Should arbitrators be the captives of the parties who decide on the format of proceedings at the cost of jettisoning the basic identifying principles–speed, economy, and justice?" *Id.* at 8.

[71] For example, Alleyne proposed a set of simplified rules of evidence to counter the trend toward over-judicialization. Alleyne, *supra* note 2. For other examples, see *supra* notes 57, 60, 62, and 67.

[72] George Nicolau, *Can the Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense, in* ARBITRATION 1986: CURRENT AND EXPANDING ROLES PROCEEDINGS OF THE THIRTY-NINTH MEETING, NATIONAL ACADEMY OF ARBITRATORS 69 (Walter J. Gershenfeld ed., 1987). Conversely, incremental formality, like inflation, comes at a price. Nolan & Abrams, *supra* note 1, at 62. Part of the price, according to one limited study at least, is that as formality increases, the willingness to arbitrate decreases. Rubin et al., *supra* note 17, at 389.

[73] The alternatives, such as grievance mediation and med-arb, are also ample, though they have not flourished. *See* Matthew T. Roberts et al., *Grievance Mediation: A Management Perspective*, 45 ARB. J., Sept. 1990, at 15, 15 (stating that less than 4% of labor contracts in private sector provide for grievance mediation). Nor has "expedited arbitration," which Murphy, *supra* note 4, at 9, pointed out, is an ironic term. For Canadian initiatives in expedited arbitration, see John Sanderson et al., *Expediting the Arbitration, in* ARBITRATION 1999: QUO VADIS? THE FUTURE OF ARBITRATION AND COLLECTIVE BARGAINING PROCEEDINGS OF THE FIFTY-SECOND ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 80 (Jay E. Grenig & Steven Briggs eds., 2000).

[74] The results of surveys to date of labor and management advocates as to the extent of commitment are ambiguous in light of the limited response rate and the confusing item construction. *See* Arthur Eliot Berkeley, *The Most Serious Faults in Labor-Management Arbitration Today and What Can Be Done to Remedy Them*, 40 LAB. L.J. 728, 728 (1989); Veglahn, *supra* note 13, at 50. In any event, the action—or in this case, the inaction—has spoken louder than the words.

[75] Nicolau, *supra* note 72, at 91.